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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF OREGON
8 MEDFORD DIVISION

9 **KLAMATH IRRIGATION DISTRICT,**

10 Plaintiff,

11 v.

12 **UNITED STATES BUREAU OF**
RECLAMATION, DAVID
BERNHARDT, Acting Secretary of the
Interior, in his official capacity, BRENDA
BURMAN, Commissioner of the Bureau
of Reclamation, in her official capacity,
and ERNEST CONANT, Director of the
Mid-Pacific Region, Bureau of
Reclamation, in his official capacity, and
JEFFREY NETTLETON, in his official
capacity as Area Manager for the
Klamath Area Reclamation Office.

18 Defendants.
19

Case No. 1:19-cv-00451-CL

**SECOND AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

20
21 **Nature of Action**

22 1. Plaintiff Klamath Irrigation District (“KID” or “Plaintiff”), on behalf of
23 itself and its landowners, brings this action for declaratory relief to protect their private
24 property rights (i.e., vested water rights) from Defendants’ regular, sustained, and
25 ongoing violations of the Reclamation Act of 1902, Ch. 1093, 32 Stat. 388 (“Reclamation
26 Act”) and the Fifth Amendment to the United States Constitution.

1 2. The past, present, and future agency actions, inactions, findings, and
2 conclusions that Plaintiff is asking the Court to declare unlawful are being carried out by
3 Defendant United States Bureau of Reclamation (“Reclamation” or “Defendant”) and its
4 officers and agents pursuant to and in accordance with a Proposed Action and Amended
5 Proposed Action evaluated by the National Marine Fisheries Service (“NMFS”) and
6 United States Fish and Wildlife Service (“FWS”) (collectively the “Services”), as well as
7 Defendant Reclamation, in their:

8 (a) Joint Biological Opinion on the Effects of the Proposed Klamath
9 Project Operations from May 31, 2013, through March 31, 2023, on Five Federally
10 Listed Threatened and Endangered Species (“2013 BiOp”),

11 (b) FWS Biological Opinion on the Effects of Proposed Klamath Project
12 Operations from April 1, 2019, through March 31, 2024, on the Lost River Sucker and
13 the Shortnose Sucker (“2019 FWS BiOP”),

14 (c) NMFS Biological Opinion, and Magnuson-Stevens Fishery
15 Conservation and Management Act Essential Fish Habitat Response for Klamath Project
16 Operations from April 1, 2019 through March 31, 2024 (“2019 NMFS BiOP”), and

17 (d) Reclamation’s Final Environmental Assessment Implementation of
18 Klamath Project Operating Procedures 2019-2024 and related Finding of No Significant
19 Impact (“OP”).

20 3. Defendants have caused or are imminently prepared to cause Plaintiff and
21 its landowners irreparable harm through the actions, inactions, decisions, findings, and
22 conclusions analyzed in the foregoing documents.

23 4. The past, present, and future agency actions, inactions, findings, and
24 conclusions Plaintiff is asking the Court to declare unlawful include, but are not limited
25 to, the following:

1 (a) Defendants are unlawfully using 400,000 acre-feet (or more) of
2 water in Upper Klamath Lake (“UKL”) reservoir for instream purposes each year without
3 a water right or other lawful authority under Oregon law in violation of Section 8 of the
4 Reclamation Act.

5 (b) Defendants are unlawfully capping the amount of water that Plaintiff
6 and its landowners are entitled to receive from UKL reservoir at less than the amounts
7 they are entitled to beneficially use under their water rights in violation of Section 8 of
8 the Reclamation Act.

9 (c) Defendants are unlawfully divesting Plaintiff and its landowners of
10 their vested water rights in the beneficial use of water in UKL reservoir, as elsewhere
11 alleged in this Second Amended Complaint, without purchasing such rights, condemning
12 them “under judicial process,” or otherwise adhering to state law, in violation of Sections
13 7 and 8 of the Reclamation Act.

14 (d) Defendants are depriving Plaintiff and its landowners of their vested
15 water rights in the beneficial use of water in UKL reservoir without due process of law in
16 violation of the Fifth Amendment to the United States Constitution through the actions,
17 inactions, findings, and conclusions generally identified above and more specifically
18 alleged herein.

19 **Jurisdiction, Venue, and Waiver of Sovereign Immunity**

20 5. Jurisdiction arises under 5 U.S.C. §§ 701–706 and 28 U.S.C. §§ 1331,
21 2201, and 2202.

22 6. The acts alleged herein occurred in the District of Oregon and venue is
23 therefore appropriate pursuant to 28 U.S.C. § 1391.

24 7. Defendants’ sovereign immunity is waived pursuant to 5 U.S.C. § 702
25 because Plaintiff is making claims for equitable relief, not money damages. Defendants’
26

1 sovereign immunity is also waived pursuant to 43 U.S.C. § 666(a), as this is a suit for the
2 administration of rights to the use of the water of the Klamath River system.

3 **Parties**

4 8. KID is an irrigation district duly constituted and existing pursuant to ORS
5 Chapter 545. KID and its landowners hold vested water rights entitling them to
6 beneficially use live flow and water stored in UKL reservoir, for purposes of irrigation
7 and other beneficial uses. Under Oregon law, all private property interests held by KID,
8 including vested water rights, are held in trust for the benefit of its landowners. KID
9 brings this action in a representative capacity to protect the rights of its landowners as
10 much as its own, as well as the rights of water right holders outside its own boundaries to
11 whom KID owes affirmative non-discretionary water delivery obligations.

12 9. Reclamation is a federal agency, or bureau, within the United States
13 Department of the Interior. Reclamation holds a water right entitling it to store water in
14 UKL reservoir to benefit the separate irrigation rights of KID, its landowners, and other
15 water right holders within the Klamath Reclamation Project. Defendant does not have a
16 water right, instream lease, or any other legal authorization under state or federal law to
17 use water stored in UKL reservoir for instream purposes.

18 10. Defendant David Bernhardt is the Acting Secretary of the United States
19 Department of the Interior. In such capacity, Defendant Bernhardt is directly responsible
20 for administration of, and compliance with, federal reclamation law and other laws of the
21 United States, including those pertaining to the Klamath Reclamation Project.

22 11. Defendant Brenda Burman is the Commissioner of the Defendant United
23 States Bureau of Reclamation. In such capacity, Defendant Burman is directly
24 responsible for administration of, and compliance with, federal reclamation law and other
25 laws of the United States, including those pertaining to the Klamath Reclamation Project.

26

1 Nothing in this Act shall be construed as affecting or intending to
2 affect or to in any way interfere with the laws of any State or
3 Territory relating to the control, appropriation, use, or
4 distribution of water used in irrigation, or any vested right
5 acquired thereunder, and the Secretary of the Interior, in carrying
6 out the provisions of such sections, shall proceed in conformity
7 with such laws, and nothing in such sections shall in any way
8 affect any right of any State or of the Federal Government or of
9 any landowner, appropriator, or user of water in, to or from any
10 interstate stream or the waters thereof.

11 19. In 1905, the Oregon Legislative Assembly sought to advance the purposes
12 of the Reclamation Act and the development of a Reclamation project in the Klamath
13 Basin, by enacting Chapter 5, Oregon Laws of 1905 and Chapter 228, Oregon Laws
14 1905.

15 20. Through enactment of Chapter 5, Oregon Laws of 1905 the State of Oregon
16 granted to the United States, for purposes of irrigation and reclamation, authorization to
17 lower the water level of certain lakes, including Upper Klamath Lake, and to use all or
18 any part of the beds of such lakes for the storage of water in connection with reclamation
19 or irrigation. By the same enactment, the State of Oregon ceded to the United States title
20 to any land uncovered by the lowering of such lakes, to use for purposes in furtherance of
21 the 1902 Act.

22 21. Through enactment of Chapter 228, Oregon Laws 1905, the State of
23 Oregon specifically described the manner in which water could be appropriated for
24 Reclamation projects in Oregon. Chapter 228, Oregon Laws 1905 provides in relevant
25 part as follows:

26 Whenever the proper officers of the United States, authorized by
 law to construct works for the utilization of water within this
 State, shall file in the office of the State Engineer a written notice
 that the United States intends to utilize certain specified waters,
 the waters described in such notice and unappropriated at the
 time of the filing thereof shall not be subject to further
 appropriation under the laws of this State, but shall be deemed to
 have been appropriated by the United States; *provided*, that
 within a period of three years from the date of filing such notice

1 the proper officer of the United States shall file final plans of the
2 proposed works in the office of the State Engineer for his
3 information; *and provided further*, that within four years from
4 the date of such notice the United States shall authorize the
5 construction of such proposed work.

6 22. On May 17, 1905, Defendant Reclamation filed notices of appropriation
7 pursuant to Chapter 228, Oregon Laws 1905 to appropriate all the then-unappropriated
8 waters of the Klamath Basin for the Klamath Reclamation Project. The notices stated
9 that “[t]he United States intends to use the above described waters in the operation of
10 works for the utilization of water in the State of Oregon under the provisions of . . . the
11 Reclamation Act,” and that “[t]he Water is to be used for irrigation, domestic, power,
12 mechanical and other beneficial uses in and upon lands situated in Klamath Oregon and
13 Modoc California counties.”

14 23. Following authorization of the Klamath Project, facilities were constructed,
15 previously existing facilities were improved and incorporated into the Klamath Project,
16 and individual landowners began applying water to beneficial use on their lands after
17 entering into contracts with the United States to repay the costs of the irrigation works
18 developed by the United States.

19 24. The Klamath Project is one of the oldest in the nation. As such, it is unique
20 from most other Reclamation projects in that it was only authorized as a single-purpose
21 irrigation project to meet the nation’s objective of developing the West. The Klamath
22 Project and other so-called “single-use” projects authorized under the original
23 Reclamation Act of 1902 are fundamentally different from so-called “multi-use”
24 Reclamation projects that were authorized by Congress later in time under the
25 Reclamation Act of 1939 and subsequent statutes, which are congressionally intended to
26 provide water for multiple different uses.

27 25. KID was formed in 1917 and thereafter entered into a contract with
28 Reclamation in 1918 to repay the costs of construction, operation, and maintenance of the

1 Klamath Project. The contract has since been amended several times, most notably in
2 1954. By virtue of its contract with Defendant, KID has a perpetual obligation to operate
3 and maintain certain irrigation works owned by the United States and an affirmative non-
4 discretionary legal and contractual obligation to deliver water to fulfill the appurtenant
5 water rights of its own landowners. KID also has a non-discretionary legal and
6 contractual obligation to deliver water needed to fulfill water rights held by certain
7 districts and landowners located outside KID's own boundaries. KID's contract
8 specifically contemplates that ownership of the transferred works it currently operates
9 and maintains, as well as any water rights held by Reclamation that are associated with
10 KID, will be eventually be transferred to KID.

11 26. Defendant has no discretion or authority to limit the amount of water KID
12 and its landowners are entitled to beneficially use under their water rights, to the extent
13 such water is physically available, without otherwise condemning or appropriating KID's
14 water rights and the rights of its landowners through judicial process in accordance with
15 Oregon law.

16 27. On February 24, 1909, the Oregon Legislative Assembly enacted the Water
17 Rights Act, which means and embraces ORS 536.050, 537.120, 537.130, 537.140 to
18 537.252, 537.390 to 537.400, 538.420, 540.010 to 540.120, 540.210 to 540.230, 540.310
19 to 540.430, 540.505 to 540.585 and 540.710 to 540.750.

20 28. Pursuant to ORS 537.110, all water within the state from all sources of
21 water supply belongs to the public. However, subject to existing rights, individuals may
22 obtain the right to use the public's water by applying for and obtaining a water right.
23 Under Oregon law, the use of the public's water is a property right. *See e.g.*, ORS
24 307.010(1)(b)(D)). The property right is said to be usufructuary because, although a
25 water right grants the right to use the public's water, ownership of the water itself
26 remains vested in the public. Oregon courts have recognized that the right to the use of

1 water constitutes a vested property interest which cannot be divested without due process
2 of law.

3 29. Oregon law (ORS 539.007(11)) defines water rights established prior to the
4 adoption of the Water Rights Act on February 24, 1909 as undetermined vested rights.
5 The Water Rights Act provides at ORS 539.010(4) that undetermined vested rights are
6 not to be impaired or affected by any of its provisions. However, ORS 539.010(4) of the
7 Water Rights Act also provides that the scope and attributes of all undetermined vested
8 rights are to be determined through an adjudication conducted in accordance with ORS
9 Chapter 539.

10 30. The adjudication process set forth in ORS Chapter 539 consists of two
11 phases: (1) an administrative phase, and (2) a judicial phase. During the administrative
12 phase, the adjudicator investigates the waters at issue, hears claims and exceptions, and
13 ultimately issues a Final Order of Determination setting forth the relative water rights of
14 the parties. Once the Final Order of Determination is issued, it is filed with the circuit
15 court having jurisdiction of the matter.

16 31. The Final Order of Determination reflects enforceable water rights under
17 Oregon law, unless and until it is stayed pending the outcome of the judicial phase or is
18 amended or changed during the judicial phase of the adjudication process.

19 32. The circuit court proceeding culminates in the issuance of a decree
20 finally determining the relative rights of all parties claiming a pre-1909 right to use the
21 waters at issue, subject to any appeal.

22 33. In 1975, the State of Oregon initiated a general stream adjudication
23 pursuant to ORS Chapter 539 of the waters of the Klamath Basin (hereafter “Klamath
24 Adjudication”). The Klamath Adjudication satisfies the requirements of the McCarran
25 Amendment, 43 U.S.C. § 666, and encompasses, *inter alia*, all pre-1909 state, federal,
26

1 and tribal claims to the use of water stored in UKL reservoir and the portions of the
2 Klamath River encompassed within the adjudication.

3 34. While the administrative phase of the adjudication of the waters of the
4 Klamath Basin was pending, and upon the written advice of the Oregon Attorney General
5 issued on March 18, 1996, the State of Oregon did not regulate or enforce pre-1909 water
6 rights in the Klamath Basin, as such rights were wholly undetermined and regulation
7 would necessarily involve pre-determination of the parties' claims. However, based on a
8 U.S. Solicitor memorandum dated January 9, 1997, the United States took the position
9 that it had an obligation to "use its best efforts to operate the Project consistent with
10 existing water rights." Memorandum from Regional Solicitors to Regional Directors,
11 Oregon Assistant Attorney General's March 18, 1996, Letter Regarding Klamath Basin
12 Water Rights Adjudication and Management of the Klamath Project, Jan. 9, 1997, at 5..
13 While the United States acknowledged that the precise nature of the existing rights
14 relating to the Project were not known with certainty because the rights had not been
15 adjudicated, it nevertheless believed these existing rights could be "reasonably estimated"
16 and that the government had a duty to ensure the Project was "operated based on the best
17 available information." *Id.* at 6.

18 35. At all times material prior to the completion of the administrative phase of
19 the Klamath Adjudication, the United States asserted, and it was otherwise assumed, that
20 all water rights associated with the Klamath Project were owned or held by the United
21 States. The United States also asserted, and it was otherwise assumed, that the Klamath
22 Tribes and others held water rights in UKL that were senior to those of KID and others
23 within the Klamath Project. While the administrative phase of the Klamath Adjudication
24 was pending, the United States distributed water from UKL based on these assumptions.

25 36. On March 7, 2013, thirty-eight (38) years after the commencing the general
26 stream adjudication for the Klamath Basin, the State of Oregon, via the Water Resources

1 Department (“OWRD”), issued its Findings of Fact and Final Order of Determination
2 (“FFOD”) and filed it with the Klamath County Circuit Court, thus completing the
3 administrative phase of the adjudication.

4 37. In May 2013, the Services issued the 2013 BiOp, which analyzed
5 modifications to the Bureau’s operation of the Klamath Project, including the use of
6 Project water for augmented instream flows (the “Proposed Action”). At or shortly after
7 the issuance of the 2013 BiOp, Reclamation adopted the Proposed Action. Thus, the
8 Proposed Action described in the 2013 BiOp was formally adopted by Reclamation after
9 the OWRD issued its FFOD.

10 38. Neither the 2013 BiOp nor the Proposed Action accounted for the effects of
11 the FFOD issued in the Klamath Adjudication on March 7, 2013, despite the fact that it
12 provided for modification once the effects were known:

13 The potential effects of the Findings of Fact and Order of
14 Determination on management of water in the Klamath Basin,
15 including Reclamation’s Project operations, are uncertain at
16 present and will likely remain uncertain for several years.
17 Therefore, the proposed action is not modified based on the
18 Findings of Fact and Order of Determination. ***In the future,
when the consequences of the adjudication are understood, the
proposed action will be modified if necessary in accordance
with parties’ legal rights to beneficial use of water.*** [emphasis
added]

19 39. In February 2014, OWRD filed an Amended and Corrected Findings of
20 Fact and Final Order of Determination (“ACFFOD”) with the Klamath County Circuit
21 Court.

22 40. Pursuant to ORS 539.130(4) and ORS 539.170, the ACCFOD is in full
23 force and effect, and water is to be distributed in accordance with the ACCFOD unless or
24 until the ACCFOD is stayed either wholly or in part pursuant to ORS 539.180.

25 41. Following the issuance of the FFOD and the ACFFOD, the legal rights of
26 the parties to this action were known and enforceable under Oregon law.

1 42. Reclamation has not sought to stay the ACCFOD either wholly or in part
2 pursuant to ORS 539.180.

3 43. The issuance of the FFOD / ACFFOD fundamentally changed the legal
4 paradigm governing the distribution of water in the Klamath Basin because it
5 determined—counter to the previous assumptions of all parties—that Reclamation in fact
6 does not hold all of the water rights associated with the Klamath Project. Specifically:

7 (a) Defendant Reclamation is the owner of a right to store water—
8 specifically, a maximum annual volume of 486,828 acre-feet of water in UKL reservoir
9 to benefit the separate water rights held by KID and other water right holders.
10 KBA_ACFOD_07060, 07084, 07117.

11 (b) Defendant Reclamation is only entitled to store water in UKL
12 reservoir to satisfy the water rights of KID, its landowners and other secondary water
13 right holders. KBA_ACFOD_7061, 07075.

14 (c) KID, its landowners, and other districts and landowners within the
15 Klamath Project hold water rights entitling them to use live flow and water the United
16 States stores in UKL reservoir for the purposes of irrigation and other beneficial uses.
17 *See, e.g.*, KBA_ACFOD_07075, 07084, 07086, 07160, 07061.

18 (d) Defendant Reclamation does not hold an instream water right
19 entitling it to use water from UKL reservoir for instream purposes.

20 (e) The Klamath Tribes hold a water right entitling them to certain
21 elevations of water in UKL at certain times of the year, but this right cannot be used to
22 call the water rights of Klamath Project irrigators. KBA_ACFOD_04941.

23 (f) Neither the Hoopa nor the Yurok tribe have vested but undetermined
24 water rights in UKL.

25 (g) Now that the ACFFOD has been issued, Oregon law (e.g., ORS
26 537.130, ORS 540.270) prohibits the use of water from the waters within the scope of the

1 Klamath Basin Adjudication without a water right (e.g., water right, determined claim,
2 instream lease).

3 44. The ACFFOD is presently enforceable under Oregon law, and must be
4 followed by all owners of determined claims pending the judicial review phase of the
5 Klamath Basin Adjudication before the Klamath County Circuit Court. ORS 539.130;
6 ORS 539.170. The Klamath County Circuit Court has not issued a stay pursuant to ORS
7 539.180.

8 45. Despite the issuance of the FFOD, and the subsequent issuance of the
9 ACFFOD, Defendant Reclamation nevertheless formally adopted the Proposed Action
10 described in the 2013 BiOp and continued to manage the Klamath Project in accordance
11 with the 2013 BiOp without regard to the enforceable determinations made in the
12 Klamath Adjudication through March 29, 2019. In doing so, Defendant Reclamation
13 unlawfully used water in UKL reservoir for instream purposes without a water right.
14 Defendants did this notwithstanding the fact that KID, its landowners, and others hold
15 water rights legally entitling them to beneficial use of such water and KID and its
16 landowners could have entered into instream leases or other economic arrangements with
17 Defendant Reclamation that would have enabled Defendants to lawfully use water
18 instream. Defendant also limited the amount of water KID, its landowners, and other
19 water right holders were entitled to beneficially use under their water rights even though
20 Defendants did not have any lawful authority to restrict the beneficial use of water and
21 Defendant had neither purchased nor condemned their rights “under judicial process” in
22 accordance with Sections 7 and 8 of the Reclamation Act.

23 46. On December 21, 2018, Reclamation issued a Biological Assessment as
24 part of a consultation process under the Endangered Species Act. Reclamation amended
25 its proposed action on February 15, 2019 (“Amended Proposed Action”). Subsequently,
26 on or about March 29, 2019, Reclamation adopted the 2019 FWS BiOp, 2019 NMFS

1 BiOp, and 2019 OP analyzing the Amended Proposed Action. Under the Amended
2 Proposed Action that Defendant has adopted and is now implementing, Defendant has
3 decided to:

4 (a) Continue using water in UKL reservoir for instream purposes
5 without a water right in violation of Section 8 of the Reclamation Act to a greater extent
6 than under the Proposed Action evaluated under the 2013 BiOp. *See e.g.*, 2019 FWS
7 BiOp, Pg. 22, *et seq.*

8 (b) Continue limiting the amount of water that KID is able to deliver to
9 itself, its landowners, and other water right holders to an amount that is less than their
10 water rights to an even greater extent than the Proposed Action evaluated under the 2013
11 BiOp. *See, e.g.*, 2109 FWS BiOp, Pg. 24.

12 (c) Continue depriving KID and its landowners of their vested water
13 rights as described in (a) and (b) above, without purchasing the vested rights or
14 condemning the vested rights under judicial process in accordance with Oregon law, in
15 violation of Sections 7 and 8 of the Reclamation Act.

16 (d) Continue denying KID and its landowners the due process to which
17 they are entitled to under the Fifth Amendment of the United States Constitution before
18 being divested of vested water rights as described above.

19 47. None of Plaintiff's rights to water in UKL have been transferred to
20 Defendants, a process that requires the approval of the OWRD. Thus, Defendants have
21 violated Sections 7 and 8 of the Reclamation Act, as well as the Fifth Amendment of the
22 Constitution, by unlawfully seizing Plaintiff's water rights without purchasing or
23 condemning them pursuant to the laws of the State of Oregon and without providing
24 Plaintiff notice and a meaningful opportunity to be heard before an impartial
25 decisionmaker.

26

1 53. Defendants' actions, inactions, findings, and conclusions in adopting and
2 implementing the Amended Proposed Action evaluated in the 2019 FWS BiOp, 2019
3 NMFS BiOp, and 2019 OP violate Section 8 of the Reclamation Act, which requires
4 Reclamation to comply with state law in the control, appropriation, use, or distribution of
5 water and prohibits Reclamation from interfering with vested rights established under
6 state law. By failing to abide by the ACFFOD, Reclamation has violated Section 8 of the
7 Reclamation Act, which is arbitrary, capricious, an abuse of discretion, or otherwise not
8 in accordance with law, contrary to constitutional right, power, privilege, or immunity, or
9 in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

10 54. Defendants' actions, inactions, findings, and conclusions in adopting and
11 implementing the Amended Proposed Action and thereby using water stored in UKL
12 reservoir for its own instream use without a water right or other authority under the laws
13 of the State of Oregon, in violation of Section 8 of the Reclamation Act, is arbitrary,
14 capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to
15 constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction,
16 authority, or limitations, or short of statutory right.

17 55. Defendants' actions, inactions, findings, and conclusions in adopting and
18 implementing the Amended Proposed Action described in the 2019 FWS BiOp, 2019
19 NMFS BiOp, and 2019 OP, and unlawfully capping the amount of water that KID, its
20 landowners, and others are entitled beneficially use under their vested water rights,
21 violates Section 8 of the Reclamation Act and is arbitrary, capricious, an abuse of
22 discretion, or otherwise not in accordance with law, contrary to constitutional right,
23 power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or
24 limitations, or short of statutory right.

25 56. Defendants' actions, inactions, findings, and conclusions in adopting and
26 implementing the Amended Proposed Action analyzed in the 2019 FWS BiOp, 2019

1 NMFS BiOp, and 2019 OP and thereby divesting KID and its landowners of the
2 beneficial use of water under their water rights deprives KID of due process of law
3 required by the Fifth Amendment to the United States Constitution, and is arbitrary,
4 capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to
5 constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction,
6 authority, or limitations, or short of statutory right.

7 57. Defendants’ conduct as alleged herein is in excess of the authority granted
8 to Defendants under Section 8 of the Reclamation Act and Defendants’ contracts with
9 KID. Accordingly, Reclamation’s actions in adopting and implementing the Amended
10 Proposed Action must be held unlawful.

11 **SECOND CLAIM FOR RELIEF**

12 **(Violation of the APA – Section 7 of Reclamation Act)**

13 58. KID reasserts and realleges ¶¶ 1 to 57, as though fully set forth herein.

14 59. A district court may hold unlawful any agency action that is found to be
15 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”;
16 “contrary to constitutional right, power, privilege, or immunity,” or “in excess of
17 statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C.
18 § 706(2)(A)–(C).

19 60. Section 7 of the Reclamation Act requires Reclamation to acquire property
20 rights, such as the right to use water under Oregon law, through Oregon’s appropriation
21 process or “by purchase or condemnation under judicial process,” using the procedure set
22 out by Oregon law. *See* 43 U.S.C. § 421.

23 61. Reclamation’s actions, inactions, findings, and conclusions in adopting and
24 implementing the Amended Proposed Action described in the 2019 FWS BiOp, 2019
25 NMFS BiOp, and 2019 OP, and thereby divesting KID and its landowners of their vested
26

1 water rights without purchasing or condemning such rights “under judicial process” in
2 accordance with state law, violates Section 7 of the Reclamation Act.

3 62. Defendants’ actions in violation of Section 7 of the Reclamation Act as
4 alleged herein must be held unlawful.

5 **THIRD CLAIM FOR RELIEF**

6 (Violation of the APA – Arbitrary and Capricious Baseline)

7 63. KID reasserts and realleges ¶¶ 1 to 62, as though fully set forth herein.

8 64. A district court may hold unlawful any agency action that is found to be
9 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”;
10 “contrary to constitutional right, power, privilege, or immunity,” or “in excess
11 of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C.
12 § 706(2)(A)–(C).

13 65. The 2013 BiOp, which was not issued until May 31, 2013, acknowledged
14 that the FFOD was issued on March 7, 2013, yet also concluded that the “potential
15 effects” of the FFOD were “uncertain” and therefore the proposed action was “not
16 modified based on the Findings of Fact and Order of Determination.” (2013 BiOp at 3–
17 4.)

18 66. The FFOD—and now the ACFFOD—defined the scope and attributes of
19 enforceable water rights under Oregon law with priority dates of 1905. The effects of
20 these water rights were known both at the time Defendant Reclamation received the 2013
21 BiOP during the subsequent period of time Defendants have implemented the Proposed
22 Action described in the 2013 BiOp. Despite this, Defendants continued to implement the
23 Proposed Action through May 29, 2019 instead of modifying the Proposed Action to
24 conform to the ACFFOD. Thereafter, Defendants adopted and implemented the
25 Amended Proposed Action described in the 2019 FWS BiOp, 2019 NMFS BiOp,
26

1 Findings of No Significant Impact (“FONSI”), and 2019 OP without proper consideration
2 of the ACFFOD.

3 67. The decision not to develop an Amended Proposed Action that complies
4 with the ACFFOD was arbitrary and capricious. Because this action violates the APA, it
5 must be held unlawful.

6 **FOURTH CLAIM FOR RELIEF**

7 **(Declaratory Judgment)**

8 68. KID reasserts and realleges ¶¶ 1 to 67, as though fully set forth herein.

9 69. Under the Declaratory Judgment Act, “any court of the United States, upon
10 the filing of an appropriate pleading, may declare the rights and other legal relations of
11 any interested party seeking such declaration, whether or not further relief is or could be
12 sought.” 28 U.S.C. § 2201.

13 70. Pursuant to 28 U.S.C. § 2202, a court granting a declaratory judgment may
14 grant further necessary or proper relief.

15 **COUNT 1**

16 **Violation of Section 8 of Reclamation Act**

17 **Unlawfully using water**

18 71. Pursuant to 28 U.S.C. § 2201, KID is entitled to a declaration that
19 Defendant is violating Section 8 of the Federal Reclamation Act by unlawfully using
20 water in UKL reservoir for instream purposes in violation of the ACFFOD during KID’s
21 irrigation season without a water right or other authority under state or federal law and
22 thereby interfering with the vested water rights of KID, its landowners, and other water
23 right holders to whom KID is legally obligated to deliver water.

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25 //

26 //

1 **COUNT 2**

2 **Violation of Section 8 of the Reclamation Act**

3 **Unlawfully curtailing water**

4 72. KID is entitled to a declaratory judgment that Defendants are violating
5 Section 8 of the Reclamation Act by unlawfully capping the amount of water KID, its
6 landowners, and other water right holders receiving water from KID are able to
7 beneficially use under the ACFFOD and in accordance with Oregon law.

8 **COUNT 3**

9 **Violation of Section 7 and 8 of Reclamation Act**

10 **(Condemnation without judicial process)**

11 73. Pursuant to 28 U.S.C. § 2201, KID is entitled to a declaratory judgment
12 stating that Defendants may not divest KID and its landowners of their property interest
13 in the beneficial use of water under their water rights as alleged herein without first
14 purchasing or condemning “under judicial process” those same rights, pursuant to
15 Sections 7 and 8 of the Reclamation Act, or otherwise acquiring such rights in
16 accordance with Oregon law.

17 **COUNT 4**

18 **Violation of the Fifth Amendment**

19 **(Right to Procedural Due Process)**

20 74. KID reasserts and realleges ¶¶ 1 to 73, as though fully set forth herein.

21 75. The due process clause of the Fifth Amendment to the United States
22 Constitution prohibits deprivations of liberty and property interests without due process
23 of law.

24 76. Due process requires, at a minimum, notice and opportunity for meaningful
25 hearing appropriate to the nature of the case.

1 77. Section 8 of the Reclamation Act and the ACFFOD authorize Defendant
2 Reclamation to store water in UKL reservoir for the benefit of Plaintiff. In turn, Plaintiff
3 and certain other water right holders have the exclusive right to beneficially use the water
4 that Reclamation stores in UKL reservoir pursuant to Section 8 of the Reclamation Act
5 and the ACFFOD.

6 78. Plaintiff's right to use water stored in UKL reservoir is a property interest,
7 which Plaintiff cannot be deprived of without due process of law.

8 79. Defendants have deprived Plaintiff of the right to use water stored in UKL
9 reservoir on a regular, sustained, and ongoing basis and will continue to do unless
10 declaratory relief is entered. Defendants have done so without: (a) obtaining a stay of the
11 ACFFOD pursuant to ORS 539.180 from the Klamath County Circuit Court; (b)
12 obtaining an instream lease from Plaintiff in accordance with Oregon Senate Bill 206
13 (2015); (c) adhering to the procedural requirements of Section 7 of the Reclamation Act
14 and purchasing Plaintiff's water rights or condemning them through judicial process; or
15 (d) otherwise acquiring the right to use water which Plaintiff holds by lawful means.

16 80. Under Section 8 of the Reclamation Act, it is the Oregon Water Resources
17 Department, not the Defendants, which is vested with authority to administer the
18 ACFFOD and determine whether or to what extent the water rights that Plaintiff holds in
19 UKL reservoir pursuant to the ACFFOD may be curtailed in any particular instance
20 based on senior water rights located outside the boundaries of the Klamath Reclamation
21 Project. The Oregon Water Resources Department has not issued an order or otherwise
22 determined that Plaintiff's water rights must be curtailed in favor of any water right user
23 outside the boundaries of the Klamath Reclamation Project.

24 81. By reallocating water in UKL reservoir to instream purposes without
25 obtaining an instream lease from Plaintiff pursuant to SB 206 (2015), obtaining a stay of
26 the ACFFOD pursuant to ORS 539.180, condemning Plaintiff's water rights in

